

MEMORANDUM

Agenda Item No. 8(A)(1)

TO: Honorable Vice Chairwoman Audrey M. Edmonson
and Members, Board of County Commissioners

DATE: December 18, 2012

FROM: R. A. Cuevas, Jr.
County Attorney

SUBJECT: Resolution approving agreement
to resolve outstanding coverage
claim for mutual releases of all
claims and a payment to the
County of \$8,000,000.00

The accompanying resolution was prepared by the Aviation Department and placed on the agenda at the request of Prime Sponsor the County Attorney's Office.



R. A. Cuevas, Jr.
County Attorney



RAC/jls

Memorandum



Date: December 18, 2012

To: Honorable Vice Chairwoman Audrey M. Edmonson
and Members, Board of County Commissioners

From: Carlos A. Gimenez
Mayor 
R.A. Cuevas, Jr.
County Attorney 

Subject: Resolution Approving Settlement Agreement with Axis Surplus Insurance Company, Commonwealth Insurance Company, Arch Specialty Insurance Company, and Landmark American Insurance Company

RECOMMENDATION

It is recommended that the Board of County Commissioners (Board) approve the attached settlement agreement between Miami-Dade County and Axis Surplus Insurance Company, Commonwealth Insurance Company, Arch Specialty Insurance Company, and Landmark American Insurance Company (collectively, the "Carriers"). The Carriers provide property insurance for various County facilities, including Miami International Airport (MIA). The proposed settlement resolves all claims among the parties relating to the November 28, 2008, crash of the South E-Satellite Automated People Mover (APM) train at MIA, with the Carriers agreeing to pay \$8 million to the County.

SCOPE

The settlement is centered on events at MIA located primarily within Commissioner Rebeca Sosa's District Six; however, the impact of this item is countywide as MIA is a regional asset.

FISCAL IMPACT/FUNDING SOURCE

The County will receive \$8 million from Carriers as part of this settlement.

BACKGROUND

The Airport utilizes an elevated, two-track, APM to transfer passengers between the Lower E Terminal and the E-Satellite. The APM system is comprised of two trains on separate tracks: the North Train and South Train. The trains are remotely driven and are not normally operated by an onboard conductor. There are multiple redundant safety features built into the system to ensure: (i) the trains do not stop or start suddenly; (ii) the doors remain closed during transit; (iii) the trains do not reach unsafe speeds; and (iv) the trains stop.

On November 28, 2008, the South E-Satellite Train crashed into the Lower E Terminal. Investigation revealed that certain onboard processors had failed and some onboard safety systems had been bypassed. The bypassing was allegedly done to aid in troubleshooting issues with the operation of the approximately 27-year-old APM. The crash resulted in the total loss of the South E-Satellite train.

The Carriers provide first-tier property insurance on the APM. On October 29, 2009, the County put the Carriers on notice of the loss. The current proof of loss filed by the County with the Carriers asserts that replacement cost of the train is \$25,835,590, and the Carriers have expressed concerns regarding that amount. As of the time of the proposed settlement, the Carriers had not made a

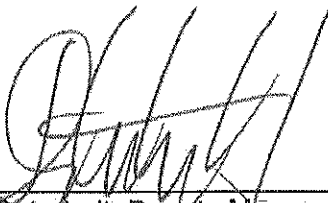
coverage decision regarding the train given the policy contains an exclusion for claims arising out of negligent workmanship.

Further, the policy provides coverage in the amount necessary to replace the train in like condition, if repairs have commenced within two years of the crash. Failure to satisfy this provision would entitle the County only to actual cash value which, given depreciation and obsolescence, would be negligible. The County has made some repairs to Lower E Terminal and the APM guideways but does not have a contract in place to replace the train. Therefore, the Carriers and the County disagree on whether replacement cost is contractually required, assuming coverage exists.

In the event that replacement cost is not the appropriate measure of the loss, and assuming coverage exists, the Carriers are liable for the actual cash value of the train. The actual cash value of the damaged train was preliminarily appraised at \$5.5 million, not including control systems and power supplies; the deductible under the policy is \$5 million dollars. Though disputed by the County, there is a significant amount of analysis suggesting that the APM is well past its useful service life and is functionally obsolete, therefore depressing its actual cash value. In the event that actual cash value was the measure of the loss, recovery under the policy would be minimal.

On October 24, 2012, in an attempt to resolve these issues without the need for litigation, the County and the Carriers agreed to mediate this matter before the Honorable Gerald T. Wetherington. At the mediation, the Carriers agreed to the attached settlement, which provides for payment to the County of \$8 million. This payment is only conditioned on a full and final release of the Carriers for the loss, and allows the County to make immediate use of the settlement funds.

This settlement is fair and reasonable given the uncertainties surrounding both the existence of coverage and the proper value of the train. Pursuant to Resolution No. R-743-11, the Board approved a settlement agreement with the entity maintaining the train at the time of the crash that paid the County \$4 million. Hence, total compensation related to the crash, inclusive of the prior settlement and the attached proposed settlement, would be \$12 million. Given the age of the train at the time of the incident, this sum represents a reasonable value to the County.



Jack Osterholt, Deputy Mayor




MEMORANDUM

(Revised)

TO: Honorable Vice Chairwoman Audrey M. Edmonson
and Members, Board of County Commissioners

DATE: December 18, 2012

FROM:


R. A. Cuevas, Jr.
County Attorney

SUBJECT: Agenda Item No. 8(A)(1)

Please note any items checked.

- ☐ "3-Day Rule" for committees applicable if raised
- ☐ 6 weeks required between first reading and public hearing
- ☐ 4 weeks notification to municipal officials required prior to public hearing
- ☐ Decreases revenues or increases expenditures without balancing budget
- ☐ Budget required
- ☐ Statement of fiscal impact required
- ☐ Ordinance creating a new board requires detailed County Mayor's report for public hearing
- ☒ No committee review
- ☐ Applicable legislation requires more than a majority vote (i.e., 2/3's ____, 3/5's ____, unanimous ____) to approve
- ☐ Current information regarding funding source, index code and available balance, and available capacity (if debt is contemplated) required

Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 8(A)(1)
12-18-12

RESOLUTION NO. _____

RESOLUTION APPROVING SETTLEMENT AGREEMENT BETWEEN MIAMI-DADE COUNTY, AND AXIS SURPLUS INSURANCE COMPANY, COMMONWEALTH INSURANCE COMPANY (NOW KNOWN AS NORTHBRIDGE INDEMNITY INSURANCE CORPORATION), ARCH SPECIALTY INSURANCE COMPANY, AND LANDMARK AMERICAN INSURANCE COMPANY, TO RESOLVE OUTSTANDING COVERAGE CLAIM FOR MUTUAL RELEASES OF ALL CLAIMS AND A PAYMENT TO THE COUNTY OF \$8,000,000.00

WHEREAS, this board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board hereby approves the settlement of the lawsuits as set forth in the Settlement Agreement and authorizes the execution by the County Mayor or his designee of the Settlement Agreement in substantially the form attached hereto.

The foregoing resolution was offered by Commissioner ,
who moved its adoption. The motion was seconded by Commissioner
and upon being put to a vote, the vote was as follows:

Audrey M. Edmonson, Vice Chairwoman	
Bruno A. Barreiro	Lynda Bell
Esteban L. Bovo, Jr.	Jose "Pepe" Diaz
Sally A. Heyman	Barbara J. Jordan
Jean Monestime	Dennis C. Moss
Rebeca Sosa	Sen. Javier D. Souto
Xavier L. Suarez	Juan C. Zapata

The Chairperson thereupon declared the resolution duly passed and adopted this 18th day of December, 2012. This resolution shall become effective ten (10) days after the date of its adoption unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

MIAMI-DADE COUNTY, FLORIDA
BY ITS BOARD OF
COUNTY COMMISSIONERS

HARVEY RUVIN, CLERK

By: _____
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency.

David Stephen Hope

dsh

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (the "Agreement") dated _____, 2012, is executed by and between Miami-Dade County, a political subdivision of the State of Florida (the "County"), and (i) Axis Surplus Insurance Company ("AXIS"), (ii) Commonwealth Insurance Company (now known as Northbridge Indemnity Insurance Corporation) ("Commonwealth"), (iii) Arch Specialty Insurance Company ("Arch"), and (iv) Landmark American Insurance Company ("Landmark") (collectively the "Insurers").

RECITALS

WHEREAS, on October 22, 2009, the County tendered an insurance claim to the Insurers for property damage in connection with a November 28, 2008 accident that occurred on the South train of the automated people mover located at Satellite E in the Miami International Airport (the "Accident Claim"), pursuant to a layered insurance program, policy numbers EAF726585-08 issued by AXIS, US7428 issued by Commonwealth, ESP0026972-00 issued by Arch and LHD357670 issued by Landmark, all for the period May 3, 2008, to May 3, 2009;

WHEREAS, the Insurers opened claim files (Axis Claim No. ATL045495, Commonwealth Claim No. C004933, Arch Claim No. 69245 and Landmark Claim No. 7030032970), and commenced their investigations which included a site visit of Miami International Airport, review of documents, and examinations under oath of County employees and agents; and

WHEREAS, the parties agree that it is in their best interest to settle the Accident Claim and avoid further expense, including possible litigation;

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NOW THEREFORE, in consideration of the foregoing recitals and following premises, promises, covenants, conditions, and other good and valuable consideration, the receipt, adequacy, and sufficiency of which is acknowledged, the County and Insurers agree as follows:

TERMS

1. The above recitals are incorporated by reference and are a part of this Agreement.

2. Subject to the terms and conditions of this Agreement and approval of the settlement by the Miami-Dade County Board of County Commissioners (the "Board"), it is understood that the terms of this Agreement, the payment of any moneys, or any other action taken pursuant to this Agreement are made as a contractual settlement and resolution of the Accident Claim.

3. As a material inducement to and in consideration for the parties entering into this Agreement, and subject to the terms and conditions of this Agreement, the Parties agree to a settlement amount of Eight Million Dollars and No Cents (\$8,000,000.00), which shall be paid by the Insurers by check made payable to Miami-Dade Aviation Department (the "Settlement Funds"). The Settlement Funds shall be paid severally as follows:

AXIS	\$ 4,000,000.00
Commonwealth	\$ 2,400,000.00
Arch	\$ 800,000.00
Landmark	\$ 800,000.00

4. The Insurers shall pay the total sum of the Settlement Funds within twenty (20) days after receipt by the Insurers' Counsel, W. Douglas Berry, Esq. and Janice C. Buchman, Esq., Butler Pappas Weihmuller Katz Craig LLP, 777 South Harbour Island Boulevard, Suite 500, Tampa, Florida 33602 from the County of four fully executed originals of this Agreement.

5. Any payment provided for in this Settlement Agreement not made by the Insurers to the County in compliance with Paragraph 4 above shall begin to bear interest ten (10) days later, at the rate set forth in Section 55.03(1) of the Florida Statutes.

6. For the consideration and promises made herein, the County releases and forever discharges the Insurers from any and all civil claims, causes of action, demands, disputes, damages (whether compensatory, consequential, contractual, or extra-contractual), costs, interest, loss of services, expenses, compensation, obligations, and rights of whatever nature and kind, known or unknown, past, presently existing, or future, foreseen or unforeseen, accrued or not yet accrued, arising or resulting from, associated with, or related in any way to the Accident Claim. Such full and final release and discharge is made by County in its respective rights and for its successors, executors, agents, employees, assigns, Commissioners, Mayors, Deputy Mayors, and any and all other persons, firms, corporations, or other entities who may claim by or through the County. The County agrees that it will not, and that its legal representatives and assigns shall not, hereafter file in any court any action relating to the Accident Claim, with the exception of any action to enforce this Agreement, and that to any action not excepted above which nevertheless may hereafter be brought, this Agreement shall be a complete and conclusive defense.

7. For the consideration and promises made herein, the Insurers release and forever discharge the County from any and all claims, causes of action, demands, disputes and rights of whatever nature and kind, known or unknown, past or future, related in any way to the Accident Claim. Such full and final release and discharge is made by the Insurers in their respective right and for their successors, executors, agents, employees, assigns, subcontractors, sureties, suppliers, and any and all other persons, firms, corporations, or other entities who may claim by

or through the Insurers. The Insurers agree that they will not, and that their legal representatives and assigns shall not, hereafter file in any court any action relating to the Accident Claim, with the exception of any action to enforce this Agreement, and that to any action not excepted above which nevertheless may hereafter be brought, this Agreement shall be a complete and conclusive defense.

8. Except as otherwise provided in this Agreement, each party shall bear its own attorneys' fees and costs relating to or arising from the Accident Claim.

9. This Agreement shall be construed under the laws of the State of Florida.

10. This Agreement together with all documents required to be executed hereunder constitutes the entire agreement and understanding between the parties to this Agreement. No supplement, modification, or amendment of this Agreement shall be binding unless it is executed in writing by the parties.

11. As between the County and the Insurers, the terms and conditions of this Agreement are fully set forth in this document and no other material terms exist outside this document. As between the County and the Insurers, this Agreement supersedes all prior and contemporaneous agreements and understandings.

12. The parties represent and agree that they have participated equally in the negotiation of the terms and provisions set forth in this Agreement and that no presumptions or inference shall apply against any party hereto to its construction.

13. The parties declare that they have completely read the terms of this Agreement, that they have discussed the terms of the Agreement with legal counsel of their choice, that they are relying upon their own judgment, belief and knowledge of the nature, extent and duration of any damages and liability therefore, and that they fully understand and voluntarily accept the

terms for the purpose of making a full and final compromise, adjustment, and settlement of claims.

14. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, representatives, agents, attorneys, employees, officers, directors, predecessors, affiliates, successors or assigns in connection with any legal action arising out of the agreement.

15. By executing this Agreement the undersigned warrant and represent that they are authorized to enter into this Agreement and empowered to bind their respective parties to its terms. Further, the parties represent that they have not assigned, transferred or granted to any other entity or third party, their rights or claims subject to this Agreement.

16. The parties have attempted to create an Agreement that is lawful and enforceable in all respects. The validity of this Agreement shall not be affected by any subsequent changes in federal, state, or county law, whether through legislation or judicial interpretation, which create, eliminate, or change the rights and obligations of the parties. However, if any provision of this Agreement is held to be invalid, void, or unenforceable, the balance of the provisions shall, nevertheless, remain in full force and effect and shall in no way be affected, impaired or invalidated.

See next page.

IN ACCEPTANCE WHEREOF, the parties have set their respective hands as of the date and year appearing by their respective signatures.

Miami-Dade County

Axis Surplus Insurance Company

By: _____
[_____]

By: W.D. Berry
[W.D. Berry]

Title:

Title: ATTORNEY

Dated: _____, 2012.

Dated: Nov. 1, 2012.

Commonwealth Insurance Company
(now known as Northbridge Indemnity
Insurance Corporation)

Arch Specialty Insurance Company

By: W.D. Berry
[W.D. Berry]

By: W.D. Berry
[W.D. Berry]

Title: ATTORNEY

Title: ATTORNEY

Dated: Nov. 1, 2012

Dated: Nov. 1, 2012

Landmark American Insurance Company

By: W.D. Berry
[W.D. Berry]

Title: ATTORNEY

Dated: Nov. 1, 2012